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BOOK REVIEWS

Éléments d'Introduction Générale à l'Etude des Sciences Juridiques: I. La Définition du Droit. By Henri Lévy-Ullmann, Professor of Civil Law at the University of Lille. Paris, Rec. Sirey, 1917. pp. 176.

It has been aptly said that the definition of law is the battle ground of jurisprudence. The author of the work under review has undertaken, as part of a task involving a fundamental reëxamination of the definition, classification and general survey, theory and evolution of law, to present a criticism of existing French definitions of law and to offer what he considers a satisfactory all-embracing single definition of the chameleonic term *droit* (law or right).

The difficulty of his task is enhanced by the varying meanings attached in civil law countries to the abstract word *droit*, *derecho*, *diritto*, *Recht* or *jus*. It is used, first, with an ethical connotation of "right,"; second, in the analytical sense of a personal claim (right) to the performance of a correlative act or to forbearance by another (duty), a concept described by civilians by prefixing to "right" the word "subjective"; and third, as a body of rules of action enforceable by the State, that is, law in general. Another set of words has also been used to denote law, namely, *loi*, *ley*, *legge*, *Gesetz*, *lex*. In his exposition and criticism of the various definitions of law which have been adopted by different jurists, and in which now one and now the other of these two sets of words have been emphasized, the author has failed to point out, as Roscoe Pound has so ably done, that the preponderance of the former set (*jus*, *droit*) is identified with those periods of legal history in which the traditional element, involving reason and justice or juristic reasoning, has prevailed; whereas the latter set (*lex*, *loi*) is identified with periods of marked legislative activity, such as followed the Reformation, the French Revolution and the growth of the national State, that is, periods in which the imperative element has prevailed. Definitions which contain both elements, e. g. those of Cicero, Blackstone and others, evidence the transition period in which they lived.

Professor Lévy-Ullmann begins with the Romans. While paying tribute to their superiority as the founders of the technique of legal science, he charges them with having failed to bequeath to posterity a good definition of law. Nevertheless, he shows that the Institutes of Justinian, borrowing from the rules of Ulpian (himself, in this respect, the follower of Celsus) begin by definitions of *justitia*, *jurisprudentia* and *jus*. Ulpian having lived in the classical age of Roman legal development, we may well expect to find that reason and justice prevail in his definition of law. Thus, *justitia* is "the constant and perpetual will to assign to each his due" (*jus suum*); *jurisprudentia* is "the knowledge of things divine and human, the science of what is just and unjust"; and *jus* is "the art of what is right and equitable." The author might have begun with Cicero (*De Legibus*) who lived in the intermediate period between the Twelve Tables and the classical age when the imperative element was a virile source of law. But the classical emphasis upon ethical standards in the law, notably the maxims, *honeste vivere*, *alterum non laedere*, *sum cuique tribuere* laid the seed, in large degree, for the later development of natural law—in which international law had to find its inspiration—and from which positive law as the creation of the sovereign was subsequently distinguished; and for the growth, beginning with Grotius, of schools of jurists concerned with the origin and basis and, in more modern times, with the function of law. From the sixteenth to the nineteenth century, law has been deemed to rest successively on theology, reason, the nature of man, and history. Whether

justice is the aim or the handmaid of law has been an element of controversy among jurists who have essayed a definition of law. To this factor the author has paid little attention in presenting definitions.

The general interest in Professor Lévy-Ullmann's work is greatly diminished by reason of the facts (1) that he has not covered the period between Justinian's Code and the beginning of the nineteenth century in France; (2) that the definitions of modern French jurists, therefore, lack that historical explanation which would vitalize their formal character; (3) that the philosophical theories underlying the definitions are but rarely mentioned, and without these the author's criticism is necessarily inadequate; and (4) that it is confined almost solely to French jurists, whereas the theory and definition of law can hardly be treated satisfactorily without a full discussion of the contributions of the Historical School of Savigny, who identified "right" and "law," the Analytical School of Austin and his followers, and the various disciples of the modern Social-Philosophical School in Germany and elsewhere. He does mention the definitions of Kant, Zachariae and Jhering, but without that comprehensive setting in the history of legal thought which others have given and without which one cannot intelligently evaluate their contributions to legal science.

Inasmuch as Professor Lévy-Ullmann professes to have prepared only an elementary work for the use of first-year students—Americans will not find it easy to understand that a book of 175 pages on the "definition of law" is elementary—we can hardly hold him to account for the defects just mentioned, which deprive the book of any general value to the more advanced student. He divides the French authors of the nineteenth century who have defined law (*droit*) into three categories:

(1) Those commentators of the *Code Civil* who identify law with *loi* (enacted law), to whom *droit* is merely an appendage of *loi*, either subordinate or superimposed or confused with it. This is perhaps natural in a period following the Revolution and the enactment of the French civil code, generally regarded as the apotheosis of codification. In such a period it is usual for legal thought to remain sterile. "Jurisprudence is the science of laws (*lois*)"; "*Loi* is a rule established by a superior will to direct human actions" (Touillier); *droit* is "the art of applying the *lois*"; or it is that "absolute justice" toward which "laws" aim (Laurent). All this is not unnatural to a time when the imperative element in law predominated, and in a country where judge-made law has little if any force in establishing binding rules.

(2) Those writers who, instead of adopting one definition of law, enumerate the principal aspects of *droit* and endow each with a special definition. This school—among whom are Beudant, Vallette, Gény, Baudry-Lacantinerie, Planiol and Surville, whose method now seems to prevail in French legal education—distinguished natural law from positive law and from "objective" law and "subjective" right (*droit*). When we find an authority like Planiol defining "subjective right" (*droit*) as "a faculty recognized in a person by the law, which permits him to accomplish certain acts, e. g. a right of property," we can appreciate that analytical jurisprudence has made but little impression in France. The French seem to make no distinction between "right" and "privilege."

(3) Those who give a single comprehensive definition of law. The author approves in principle the single definition, but criticises those he quotes for one reason or another. In the case of Aubry and Rau, who followed Zachariae, our author concludes that law governs other relations than those merely of men, and that external constraint may emanate from other authorities than the State. Here, of course, he would find himself in opposition to Salmond, Holland and most of the Anglo-American writers. Bufnoir's definition of law as "a body

of rules to which the liberty of the individual is subjected in conflict with other individuals," meets qualified approval. He emphasizes Bufnoir's original characterization of "liberty" as the measure of law, although Kant in 1797, as the author later admits, made "liberty" the purpose of law. He then criticizes the utilitarians like Bentham and the sociological definitions of Richard, Tanon, Jhering and Duguit who define law teleologically. Whereas Jhering proceeded from the formal to the sociological, Lévy-Ullmann undertakes to reverse the process. Definition by content or aim he disapproves. Demogue's definition that "whatever is imposed by organized force, against which there is no recourse" is law, while perhaps suited to modern international relations, will hardly command general juristic support. Nor is it always the case, as J. C. Gray and others have said, that enforcement in courts is necessary to make a rule law. Indeed, in *ex parte Larrucea* (1917, S. D. Cal.) 249 Fed. 981, the rule laid down by the court was expressly reversed by the Executive as Commander-in-Chief, as in conflict with a treaty immunity.

While admitting that law may be studied from the various points of view above mentioned, the author then proceeds, on the basis of his previous criticism, to present his own formal definition, which he believes embraces the various aspects of "*droit*" (law as well as *right*). Beginning with a delimitation, a legal rule and a legal sanction, an object and a subject, he posits this definition: "Law is the delimitation of what men or groups have the liberty to do and not to do, without incurring a penalty or damages or any particular exercise of force."

Just as Austin's characterization of positive law as a command set by a determinate sovereign to political inferiors, was too narrow, as excluding the traditional element in law and those many rules which were never prescribed or "set" by a sovereign, so Lévy-Ullmann's definition seems too wide as embracing in its permissive scope all rules of morals, ethics and religion. It is therefore of little utility, it would seem, as a definition of law. It was recognition of this weakness of formal definitions that has led modern jurists, like Jhering and Vinogradoff, impressed by the growth in the imperative element in law, to define law by its aim and function. While an individual act that is not prohibited, i. e., that one is under no duty not to do, is privileged, one can hardly say with profit to the understanding that the sum of all privileged acts constitutes law. The definition is also defective in omitting all reference to the authority restricting liberty. As a matter of fact, study of Lévy-Ullmann's work indicates the futility of attempting to define law conclusively for all time. It will necessarily change in form, content and function in different periods, as the point of view, the agencies which determine its content, and its purpose, ideals and standards change. Again, at a given time men will disagree as to its essential elements. For example, whether international law is law depends on your definition of law, a fact which some controversialists on this subject have not recognized.

But Lévy-Ullmann's work does arouse thought. Why should a book on the definition of law appear in the midst of a great war? Because, as the author intimates, great cataclysms in history have been marked by a renewed search for fundamentals, and nations will, among their social institutions generally, rethink their law. The period before us will doubtless witness a readjustment of the relation of the individual to society and to the State and many phases of the national and international economic system will undergo a metamorphosis. These changes will necessarily be reflected in the law, which is merely a regulative agency to delimit according to the *mores* of the time the conflicting interests of individuals and of groups. It is not necessarily an instrument of justice, but, primarily, of order and convenience, for the protection of the social

interest in the security of transactions. In times of stress and rapid change, with the growth in the imperative element in law there comes also a tempering of the rigorous technicality of its rules in the administration of justice by a larger exercise of judicial discretion. The greater the change the less technical becomes the law and its administration, until, as in communistic Russia, in times of martial law, and in extremes of backward society, as in certain parts of the Orient, it is found possible to dispense with law in the administration of justice. The extent of the political and economic change of the coming period will measure the body of new rules which the law will assimilate.

EDWIN M. BORCHARD.

James Madison's Notes of Debates in the Federal Convention of 1787 and Their Relation to a More Perfect Society of Nations. By James Brown Scott. New York. 8vo. Oxford University Press. 1918. \$2.00.

In Paris there is gathered a group of men representing many peoples, engaged upon the formidable task of creating a feasible league of nations. In the year 1787, the City of Philadelphia was the place of meeting of delegates sent by the various States on the American continent.

In the book under review, the author has endeavored to find a precedent for the former in the latter. Before developing his argument, he writes entertainingly of the Convention of 1787, of the occasion that called it into being, and of the qualifications and services of James Madison in reporting its proceedings.

The argument of the book is that the government created was a mere federation of states, and such being the case it is a proven fact that a league of nations could exist without endangering the liberties of its constituent members. It is therefore necessary that the author show that we have a Federated and not a National government. This is the burden of the book.

Mr. Scott says that the Convention of 1787 was a conference between representatives of independent nations . . . "a group apart from the society of nations and held only loosely together by their common consent." In the sense that the Constitution was assented to by people of independent nations, this is so. But what they agreed to was not a treaty. It was an instrument of government . . . nothing more and nothing less. By ratifying it, the people merely shifted powers of government from one agency to another. It was an act in furtherance of progressive development, not a mere restraint. He then says that the Constitution created what he calls a Federation of States, not a National Government of a common people. His idea is that the delegates represented States and not the people of America; that "the term 'people' . . . means the people of the States, not the people without reference to the States." The Preamble is dismissed with the statement that it is not a delegation of authority and therefore affords no evidence as to what is meant—a pure *non sequitur*.

The author finds evidence of this in the fact that the delegates were originally sent to represent the States; in the system of voting in the Convention; in the suggestion made in the Convention that there was no necessity for the creation of inferior Courts as uniformity could be obtained by allowing a direct appeal from the State courts to the Federal Supreme Court; and in the rejection of the plan to coerce the States through a Council of Revision. He argues it on the fact of division of powers between the State and the National Government, of the admission of new States on an equality with the old, of the theory of representation in the House and Senate and their methods of voting, and